83-1341

No. 83-

IN THE

Supreme Court of the United States

October Term, 1983

WESTERN COAL TRAFFIC LEAGUE; THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; EDISON ELECTRIC INSTITUTE; NATIONAL COAL ASS'N; CONSUMER OWNED POWER COALITION; THE CHEMICAL MANUFACTURERS ASS'N; THE ALUMINUM ASS'N, INC.; THE FERTILIZER INSTITUTE; AMERICAN PAPER INSTITUTE; AMERICAN IRON AND STEEL INSTITUTE; COPPER DEVELOPMENT ASS'N, INC.; THE COMMITEE ON TRANSPORTATION AND DISTRIBUTION OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; INTERNATIONAL MINERALS & CHEMICAL CORP.; ARKANSAS-MISSOURI POWER CO.; ARKANSAS POWER & LIGHT CO.; LOUISIANA POWER & LIGHT CO.; MISSISSIPPI POWER & LIGHT CO.; NEW ORLEANS PUBLIC SERVICE, INC.; POTOMAC ELECTRIC POWER CO.; PUBLIC SERVICE COMPANY OF INDIANA, INC.; SOUTH CAROLINA PUBLIC SERVICE AUTHORITY; CENTRAL ILLINOIS LIGHT CO.; IOWA POWER & LIGHT CO.; OKLAHOMA GAS & ELECTRIC CO.; SOUTHWESTERN ELECTRIC POWER CO.; CONSUMERS POWER CO.; COMMONWEALTH EDISON CO.; MADISON GAS & ELECTRIC CO.; NEW YORK STATE ELECTRIC AND GAS CORP.; PENNSYLVANIA POWER AND LIGHT CO.; UNION ELECTRIC CO.; WISCONSIN POWER & LIGHT CO.; WISCONSIN ELECTRIC POWER CO.; WISCONSIN PUBLIC SERVICE CORP.; CAROLINA POWER & LIGHT CO.; DUKE POWER CO.; SOUTH CAROLINA ELECTRIC & GAS CO.; VIRGINIA ELECTRIC AND POWER CO.; KERR-McGEE CORP.; ELECTRIC FUELS CORP.; ALABAMA POWER CO.; GEORGIA POWER CO.; GULF POWER CO.; MISSISSIPPI POWER CO.; SOUTHERN COMPANY SERVICES, INC.; GULF STATES UTILITIES CO.; NORTH DAKOTA PUBLIC SERVICE COMMISSION; NORTH DAKOTA STATE WHEAT COMMISSION; CHAMBER OF COMMERCE OF FARGO, NORTH DAKOTA; COASTAL STATES ENERGY CO.,

Petitioners,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ASSOCIATION OF AMERICAN RAILROADS; ATCHISON, TOPEKA AND SANTA FE RY. CO.; BURLINGTON NORTHERN R.R. CO.; CHESSIE SYSTEM; CHICAGO AND NORTH WESTERN TRANSPORTATION CO.; CONSOLIDATED RAILROAD COMPANY; DENVER AND RIO GRANDE WESTERN R.R. CO.; ILLINOIS CENTRAL GULF R.R. CO.; MISSOURI PACIFIC R.R. CO.; NORFOLK AND WESTERN RY. CO.; SEABOARD COAST LINE R.R. CO.; SOO LINE R.R. CO.; SOUTHERN PACIFIC TRANSPORTATION CO.; SOUTHERN RY. CO.; UNION PACIFIC R.R. CO.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Dated: February 13, 1984

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QUESTIONS PRESENTED

In order to secure the jurisdiction of the Interstate Commerce Commission over any complaint that a rail transportation rate is unreasonably high under the Interstate Commerce Act, a shipper must prove that the rail carrier has "market dominance," that is, that there is no "effective competition" for the transportation in issue. 49 U.S.C. §10709(a).

When the Interstate Commerce Commission considered the meaning of "market dominance" shortly after enactment of this provision, it ruled that the statutory language limited the inquiry to whether the shipper had competitive transportation alternatives for transporting that product from the origin to the destination. The Commission expressly rejected, as contrary to the statutory language, consideration of alternative products ("product competition") and alternative origins and destinations ("geographic competition").

After Congress, in the Staggers Act, reaffirmed the market dominance standard as so interpreted, the Commission in 1981 reversed its 1976 interpretation and held that it would consider product and geographic competition in adjudicating the issue of market dominance. That 1981 decision significantly limits the I.C.C.'s jurisdiction by restricting shipper access to the agency in all cases involving the fundamental issue of whether a rate exceeds a reasonable maximum. The United States Court of Appeals for the Fifth Circuit in a divided, *en banc* decision (overturning a decision by a panel of the Fifth Circuit) deferred to the Commission's new statutory interpretation.

The first question presented is whether the Interstate Commerce Commission has erroneously limited its jurisdiction by interpreting the threshold "market dominance" standard so as to improperly preclude shippers from exercising their statutory right to challenge the reasonableness of a rail rate under the Interstate Commerce Act.

The second question presented is whether the court of appeals, through its uncritical deference to the Commission's reversal of its contemporaneous statutory interpretation, abdicated its duty as a reviewing court to interpret and enforce the laws of the United States.

Rule 21.1(b) Statement

The parties to the proceeding in the U.S. Court of Appeals for the Fifth Circuit are listed below:

Western Coal Traffic League
Arkansas-Missouri Power Company
Arkansas Power and Light Company
Louisiana Power and Light Company
Mississippi Power and Light Company
New Orleans Public Service, Inc.
Potomac Electric Power Company
Public Service Company of Indiana, Inc.
South Carolina Public Service Authority
Central Illinois Light Company
Gulf States Utilities Company
Iowa Power and Light Company
Kerr-McGee Corporation
Oklahoma Gas & Electric Company
Southwestern Electric Power Company
The Aluminum Association, Inc.
Consumers Power Company
Commonwealth Edison Company
Madison Gas and Electric Company
New York State Electric and Gas Corp.
Pennsylvania Power & Light Co.
Union Electric Company
Wisconsin Electric Power Company
Wisconsin Power & Light Company
Wisconsin Public Service Corporation
Edison Electric Institute
American Paper Institute, Inc.
The National Industrial Transportation League

Carolina Power & Light Company
Duke Power Company
South Carolina Electric & Gas Company
Virginia Electric and Power Company
Consumer Owned Power Coalition
Copper Development Association, Inc.
Nebraska Public Power District
International Minerals & Chemical Corp.
The Fertilizer Institute
National Coal Association
The Chemical Manufacturers Association
The Chlorine Institute
North Dakota Public Service Commission
North Dakota State Wheat Commission
Chamber of Commerce of Fargo, N.D.
The Committee on Transportation and Distribution of the Society of the Plastics Industry, Inc.
Electric Fuels Corporation
American Iron and Steel Institute
Coastal States Energy Company
Kellogg Company
National Association of Manufacturers
Alabama Power Company
Georgia Power Company
Gulf Power Company
Mississippi Power Company
Southern Company Services, Inc.
Interstate Commerce Commission
United States of America
Association of American Railroads
Atchison, Topeka and Santa Fe Railway Company
Burlington Northern Railroad Company
Bessemer and Lake Erie Railroad Company
Chessie System
Chicago and North Western Transportation Company
Consolidated Railroad Company
Denver and Rio Grande Western Railroad Company
Illinois Central Gulf Railroad Company

Missouri Pacific Railroad Company
Norfolk and Western Railway Company
Seaboard Coast Line Railroad
Soo Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
Union Pacific Railroad

Rule 28.1 Statement

The following statement is made in compliance with the Court's Rule 28.1.

Petitioner Arkansas Power & Light Company has as its parent Middle South Utilities, Inc. and is affiliated with Louisiana Power & Light Company, Missouri Power & Light Company, and New Orleans Public Service, Inc.

Petitioners Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Company Services, Inc. are all subsidiaries of the Southern Company. Southern Electric Generating Company is a subsidiary of Petitioners Alabama Power Company and Georgia Power Company.

Petitioner Electric Fuels Corporation has as its parent Florida Progress Corporation and is affiliated with Florida Power Corporation, Talquin Corporation, Progress Financial Services, Inc., Progress Equities, Inc. and Southeastern Computer Corporation.

Petitioner Pennsylvania Power & Light Company has as a non-wholly owned subsidiary the Safe Harbor Water Power Company. Petitioner Union Electric Company has a non-wholly owned subsidiary Electric Energy, Inc. Petitioner Wisconsin Power & Light Company has as non-wholly owned subsidiaries Wisconsin River Power Company and Windworks, Inc. Petitioner Wisconsin Public Service Corp. has as non-wholly owned subsidiaries Wisconsin River Power Company and Wisconsin Valley Improvement Company.

Petitioner International Minerals & Chemical Corp. has as subsidiaries and affiliates: Chinhae Chemical Co., Coromandel Fertilizer, Ltd., Gans Transport B.V., Campagne Senegaloise Des Phosphates de TIBA, Sotave Amazonia Quimica E. Minerals S.A., Louisville Fertilizer & Gin Co., and Peoples Fertilizer Co.

Petitioner Carolina Power & Light Company has two subsidairies that are not wholly owned: Leslie Coal Mining Company and McInnes Coal Mining Company.

Petitioner Duke Power Company has one subsidiary that is not wholly owned (Martin County Coal Company).

Petitioner Virginia Electric and Power Company has as its parent Dominion Resources Inc.

Petitioner Iowa Power and Light Company has as its parent Iowa Resources Inc. and is affiliated with Redlands, Inc., Enercor, Inc., Industries of Iowa Corp., Enserco, Inc., Middlewood Inc., Unitrain Inc., Iowa Computer Resources Inc., and Westcon Inc.

Petitioner Southwestern Electric Power Company has as its parent Central and South West Corp., and is affiliated with Public Service Company of Oklahoma, West Texas Utilities Co., Central Power & Light Company, Central and South West Fuels, Inc., and Central and South West Services, Inc.

Petitioner Kerr-McGee Corporation has as non-wholly owned subsidiaries Kerr-McGee Oil (U.K.), Limited, White Shoal Pipeline Corporation, and Downtown Airpark Inc.

Of the remaining Petitioners, some are trade associations which are either unincorporated or are membership corporations, while the remainder have no parents, subsidiaries (except wholly owned subsidiaries) or affiliates.

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IN THE

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WESTERN COAL TRAFFIC LEAGUE, *et al.*,
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PETITION FOR WRIT OF CERTIORARI

Petitioners represent thousands of industries, businesses and public utilities dependent upon the Interstate Commerce Commission ("Commission" or "ICC") to protect them and the public they serve from rail carrier pricing abuses. Certiorari is requested for review of a decision of the United States Court of Appeals for the Fifth Circuit. That decision affirmed an ICC decision to limit its jurisdiction, and therefore to restrict shipper access to the right under the Interstate Commerce Act to seek relief from unreasonable rates. The questions presented in this petition are therefore of extraordinary importance.

OPINIONS BELOW

The opinion of the *en banc* court of appeals, *Western Coal Traffic League v. United States*, 719 F.2d 772 (5th Cir. 1983) [*WCTL II*], appears as Appendix A in the accompanying volume. The panel opinion, reported at 694 F.2d 378 (5th Cir. 1982) [*WCTL I*], set aside in part by the *en banc* court, appears as Appendix C. In its *en banc* decision, the court of appeals affirmed a 1981 decision by the ICC, Ex Parte No. 320 (Sub-No. 2), *Market Dominance Determinations and Consideration of Product Competition*, 365 I.C.C. 118 (1981) [*Ex Parte No. 320 (Sub-No. 2)*], which reinterpreted the statutory term "market dominance." This 1981 ICC decision overturned a contrary ruling issued in 1976, denominated Ex Parte 320, *Special Procedures for Making Findings of Market Dominance [Ex Parte No. 320]*, 353 I.C.C. 875 and 355 I.C.C. 12 (1976). The ICC's 1981 and pertinent parts of its 1976 rulings are set forth in Appendices D through F, H, and I.

JURISDICTION

The jurisdiction of the Court to review the decision of the court of appeals is invoked under 28 U.S.C. §1254(1). The jurisdiction of the court of appeals was properly invoked under 28 U.S.C. §2321 and §§2341-2350. The judgment of the court of appeals on rehearing *en banc* was entered on November 14, 1983 (App. G.).

STATUTORY PROVISIONS

Section 202 of the Railroad Revitalization and Regulatory Reform Act of 1976 [4-R Act][1] added a new Section 1(5)(c) to the Interstate Commerce Act, 49 U.S.C. §1(5)(c). The 4-R Act provision established the "market dominance" jurisdictional threshold, and the new Section 1(5)(c) defined it as follows:

> 'market dominance' refers to an absence of effective competition from other carriers or modes of trans-

[1]Pub. L. No. 94-210, §202, 90 Stat. 31, 34-39 (1976).

> portation, for the traffic or movement to which a rate applies. . .

In 1978, Congress codified the Interstate Commerce Act for purposes of technical clarity and consistency.[2] The codified version of Section 1(5)(c) appears at 49 U.S.C. § 10709(a):

> In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.

The provisions of these and related statutes are set forth in the statutory appendix in the accompanying volume.

STATEMENT OF THE CASE

In 1976, Congress defined the ICC's jurisdiction to adjudicate the maximum reasonableness of rail freight rates to encompass only those situations where the involved rail carrier or carriers possessed "market dominance." Market dominance was defined in the statute as "an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies. . ." 4-R Act, §202(b). (App. SA-6) Congress required the ICC to establish "standards and procedures" that would "provide for a practical determination [of market dominance] without administrative delay." *Id.*

In response to the Congressional directive, the Commission in 1976 instituted a rulemaking proceeding denominated Ex Parte No. 320. A critical issue in that proceeding was the proper definition of the relevant market under the statute for purposes of determining market dominance. After an exhaustive examination, the Commission concluded that the relevant market was the market for transportation services of the same product

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[2]No substantive change was intended. Pub. L. 95-473, §3(a), 92 Stat. 1337, 1466 (1978); H.R. Rep. No. 95-1395, 95th Cong., 2d Sess. 4-5 (1978).

between the same origin and destination as that identified in the challenged tariff. *Ex Parte No. 320,* 353 I.C.C. at 900-909 (App. H-4 to H-15). For example, if a shipper challenged a rail rate for the movement of magnesium ingots from Washington to Tennessee, the issue would be whether the shipper had practical competitive transportation alternatives for that product between those two points. The Commission would examine whether other rail carriers or other modes of carriage such as truck or water transport could carry the ingots from Washington to Tennessee in competition with the rail carrier whose rate was at issue.

In the rulemaking proceeding (and later before the reviewing court), the railroad industry argued that the relevant market should include all potentially interchangeable products ("product competition") and all alternative origin/destination pairs ("geographic competition"). In the example involving the reasonableness of rates for the movement of magnesium ingots from Washington to Tennessee for use in aluminum production, the railroads would have defined the market broadly to encompass any product that could potentially be substituted for magnesium in manufacturing aluminum (or perhaps some other metal), as well as all potential geographic points from which the same or substitute products might be obtained.

The Commission unanimously rejected the railroads' request that it consider product and geographic competition in making market dominance determinations for two reasons. First, it declared that the statute was "explicit" in precluding the agency from considering product and geographic competition. *Ex Parte No. 320,* 353 I.C.C. at 905 (App. H-10). The Commission stated that:

> [t]here is no language in the legislation which would warrant the extension of the phrase "the traffic or movement to which the rate applies" beyond transportation services which are comparable to that described in the issue tariff.

Second, it concluded that it would be administratively impossible to make reasoned decisions involving complex product and geographic competition issues without creating the "regulatory delay" Congress expressly sought to avoid. *Id.* at 905-906 (App. H-10 to H-12). The ICC's rejection of product and geographic competition was subsequently upheld by the United States Court of Appeals for the D.C. Circuit. *Atchison, Topeka & Santa Fe Ry. v. I.C.C.*, 580 F.2d 623, 633-34 (D.C. Cir. 1978) [*ATSF*].

After the D.C. Circuit's affirmance of *Ex Parte No. 320*, legislation was introduced that would have amended the 4-R Act definition of market dominance to require that the ICC consider product and geographic competition.[3] This attempt to change the market dominance definition during consideration of the next major rail legislation was rejected.[4] Instead, Congress, in the Staggers Rail Act of 1980,[5] expressly retained the 4-R Act definition of market dominance. The Conference Report declared that "[t]he definition of market dominance under existing law has not been altered by the Conference substitute and it is not intended that there be any change in the meaning of the term. . ." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 88 (1980) [Conference Report].

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[3]H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 4-5, 55-56 (1980) [House Report].

[4]126 Cong. Rec. 19398-19413 (1980). The proposed Title II to H.R. 7235, which had been approved by the Committee, was rejected in favor of a substitute on the floor of the House in part because the House Committee bill required the use of product and geographic competition. See, *e.g.*, 126 Cong. Rec. 19402-403 (1980). The version finally adopted by the full House made no change in the 4-R Act definition as codified in Section 10709(a). 126 Cong. Rec. H8612-13 (daily ed. Sept. 9, 1980).

[5]Pub. L. No. 96-448, 94 Stat. 1895 (1980) [Staggers Act]. In Section 202 of the Staggers Act, Congress amended the existing law by adding a provision (now codified as 49 U.S.C. §10709(d)) which precludes the ICC from making a market dominance finding if an assailed rate is below a specified revenue-to-variable cost percentage.

At the same time Congress was debating whether to amend the 4-R Act market dominance definition to include consideration of product and geographic competition, the ICC attempted to accomplish the same result through administrative action. In January of 1980, the Commission relied upon product and geographic competition to make a no-market-dominance finding in a major coal rate proceeding. *Incentive Rates on Coal – Axial, CO to Coleto Creek, TX,* 362 I.C.C. 572 (1980) [*Coleto Creek*]. Less than one month later, the House subcommittee possessing oversight authority over the ICC issued a comprehensive report criticizing *Coleto Creek.*[6] Describing *Coleto Creek* not only as an "unlawful" decision but also one which, if not overturned, would have "consequences [that] will be widespread and could seriously threaten the Nation's economic well-being," Oversight Report at 89, the subcommittee found that "in considering product and geographic competition, the agency . . . violates the 4-R Act and its own regulations and decisions." *Id.* at 84. The subcommittee directed that "[i]n determining the presence or absence of effective competition, the agency should consider only providers of transportation services between the designated origin and destination." *Id.* at iv. Later, *Coleto Creek* was set aside by a court of appeals on numerous grounds, including the Commission's abandonment of its earlier interpretation of the statutory definition of market dominance. *Central Power & Light Co. v. United States,* 634 F.2d 137 (5th Cir. 1980), *on rehearing,* 639 F.2d 1104, *cert. denied,* 454 U.S. 831 (1981). Soon after, Congress rejected the railroads' attempt to change the 4-R Act definition that had been contemporaneously interpreted by the ICC to exclude product and geographic competition.

Despite these events, the ICC instituted a proceeding shortly after the enactment of the Staggers Act in which the agency proposed to "continue" to consider product and geographic com-

[6]Comm. Print 96-IFC, 96th Cong., 2d Sess. (1980) [Oversight Report].

petition in making market dominance determinations. This proceeding was denominated as Ex Parte No. 320 (Sub-No. 2), the proceeding under consideration here.[7] After receiving public comments, the ICC issued a decision declaring that it would consider product and geographic competition in making market dominance findings because: (1) the action was required by the Staggers Act; and, (2) the change was justified by the agency's experience since 1976 in implementing the market dominance provision. *Ex Parte No. 320 (Sub-No. 2)*, 365 I.C.C. at 127-131 (App. D-13 to D-19).

In the review proceedings instituted by Petitioners under 28 U.S.C. §§2321 and 2341-2350, a divided panel of the court of appeals set aside the ICC's decision to consider product and geographic competition. *WCTL I*, 694 F.2d at 389-391 (App. C-18 to C-23). The panel majority concluded that the ICC's statutory interpretation was contrary to the text, legislative history and Congressional intent underlying the market dominance test. *Id.* The panel further observed that there was not "one iota" of evidence in the record to support the ICC's conclusion that "experience" justified a change in construction. *Id.* at 391 (App. C-23).

The panel's decision was set aside by the court upon rehearing *en banc*. The divided *en banc* court felt compelled to defer to the ICC's new construction of market dominance, even if "the members of this Court might have construed the statute differently. . . ," because the result, in the court's view, represented a permissible policy decision by the ICC. *WCTL II*, 719 F.2d at 777-780 (App. A-7 to A-12).

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[7]See, 45 Fed. Reg. 83342 (December 18, 1980). This proceeding superseded another rulemaking proceeding concerning market dominance which the ICC had instituted at the time it issued *Coleto Creek*. See Ex Parte No. 320 (Sub-No. 1), *Rail Market Dominance and Related Considerations*, 45 Fed. Reg. 3353 (Jan. 17, 1980), *discontinued*, 45 Fed. Reg. 83302 (Dec. 18, 1980). This latter proceeding was discontinued in view of the intervening passage of the Staggers Act.

The dissenting members on the *en banc* court[8] maintained that the majority's decision to defer to the ICC's statutory construction constituted an "abdication of our duty to interpret the laws of the United States." The dissent analyzed in detail the statutory language, the clarity of which, they noted, had expressly led to the Commission's original interpretation of the market dominance provision as "explicit" in precluding consideration of product and geographic competition. Unlike the majority, the dissent examined the legislative history of the 4-R Act, and found no support for the Commission's new interpretation. Finally, the dissent noted that the Commission itself had forsaken any reliance on the Staggers Act to support the change. Indeed, the dissent noted that the existence of Section 205 of the Staggers Act (App. SA-10 to SA-12) demonstrated that Congress knew the economic significance of product and geographic competition and specifically referred to those factors when it thought them appropriate, but declined to make any change in the market dominance definition. Quoting this Court, the dissent declared that "courts are the final authorities on the issue of statutory construction" and must reject administrative constructions of the statute that are inconsistent with the Congressional mandate. *WCTL II*, 719 F.2d at 780-784 (App. A-14 to A-22).

REASONS FOR GRANTING THE WRIT

This case presents questions of extraordinary importance to our economy. The ICC's erroneous limitation on its jurisdiction goes to the very heart of the right to petition for relief from unreasonable railroad transportation rates. The decision of the *en banc* court – which granted such review because of the extraordinary importance of the case[9] – also has major significance because it affects the adjudication of all pending cases

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[8]Circuit Judges Alvin B. Rubin and Thomas M. Reavely formed the majority on the panel, and dissented from the *en banc* decision.

[9]Federal Rule of Appellate Procedure 35(a)(2).

at the Commission involving maximum rate reasonableness, and all those that will be presented to the agency in the future. Moreover, because the issues involved in this case concern a rule of general applicability, the general decision to consider product and geographic competition cannot be tested in individual proceedings before the Commission.

The Commission decision is the product of a seriously flawed statutory analysis. Indeed, the Commission itself had rejected that very analysis just five years earlier, at the time that the statute was enacted. The *en banc* majority, instead of undertaking an independent review of the statute, deferred to the Commission's new-found and non-contemporaneous interpretation. In doing so, the *en banc* majority permitted the ICC to ignore the statutory language, disregard the legislative history, and flout the Congressional policy.

I. THIS CASE INVOLVES ISSUES OF EXTRAORDINARY PUBLIC IMPORTANCE

The Interstate Commerce Act imposes upon the Commission the duty to protect rail shippers from unreasonably high rate levels. This duty has lain at the very heart of the ICC's Congressional mandate since the agency's birth in 1887. *Ayrshire Collieries Corp. v. United States,* 335 U.S. 573, 592 (1948); *Southern Class Rate Investigation,* 100 I.C.C. 513, 603 (1925). The Commission's historic duty to protect rail shippers from the imposition of unlawfully high freight rates was most recently reaffirmed by Congress in the 4-R Act and the Staggers Act. Both of these laws call upon the ICC to prohibit carrier rate exploitation of shippers in those instances where carriers possess "market dominance."[10]

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[10] *See, e.g., Burlington Northern, Inc. v. United States,* 661 F.2d 964, 973 (D.C. Cir. 1981); *Cleveland-Cliffs Iron Co. v. ICC,* 664 F.2d 568, 588 (6th Cir. 1981); *Iowa Public Service Co. v. ICC,* 643 F.2d 542, 544 (8th Cir. 1981); *Union Pacific R.R. v. United States,* 637 F.2d 764, 767 (10th Cir. 1981); *Celanese Chemical Co. v. United States,* 632 F.2d 568, 577 (5th Cir. 1981).

Despite the fact that protection of captive rail shippers from rail carrier pricing abuses remains a central function of the agency, the effect of the ICC's decision on product and geographic competition is to greatly restrict access to statutory protection by administrative fiat. As observed by the court of appeals: "[W]hen such evidence is considered, the number of rates immunized from regulation is increased." *WCTL I*, 694 F.2d at 382 (App. C-2); *WCTL II*, 719 F.2d at 778 n.10 (App. A-8). No other act by the ICC can have as devastating an impact on a rail shipper's right to a fair transportation charge as a finding that the agency is without jurisdiction to hear the shipper's case. The *only* forum that shippers have available to them to question the reasonableness of rail freight rates is the ICC. *Texas and P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 435-42, 447-48 (1907). If access to the Commission is foreclosed, the shipper has no alternative but to pay a rail carrier's rate, however high that rate may be. An agency decision that strips shippers and receivers of their right to present their claims of unreasonableness to the agency is clearly of such significant scope and magnitude as to warrant review by this Court.[11]

The extreme breadth of the ICC's new interpretation of the statute allows it to avoid reviewing rail rates in precisely those markets where Congress intended regulation to continue. The effect of the Commission's administrative redefinition of the jurisdictional test is to "foreclos[e] shippers from finding an avenue to complain of the level of rates they are assessed as claimed captive shippers," and to "end the usefulness of this Commission to the body of rail shippers." ICC Docket No. 37857, *Consumers Power Co. v. Norfolk and Western Ry. Co.* (Initial Decision served July 1, 1983), slip op. at 4.

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[11]Petitioners seek only to preserve the opportunity to be heard by the Commission. Once jurisdiction attaches, the agency is of course free to determine if in fact the challenged rail rate exceeds a reasonable maximum under 49 U.S.C. § 10701a(b) (App. SA-12).

Apart from the fact that the ICC's redefinition of market dominance will eliminate jurisdiction in situations where Congress intended it to apply, the amorphous new standard entails monumental expense, effort and delay in defining the relevant product and geographic markets and addressing the existence of actual or potential competition in all such markets. It thus promotes the very type of regulatory lag which Congress sought to avoid when it ordered the ICC to adopt market dominance standards and procedures that were to "provide for a practical determination without administrative delay." 4-R Act §202(b) (App. SA-6).[12] The ICC's new definition totally defeats this statutory command.

The Commission's Ex Parte No. 320 (Sub-No. 2) decision to narrow severely its jurisdiction is clearly "indicative of an agency overeager to relinquish control." *Ford Motor Co. v. ICC*, 714 F.2d 1157, 1158 (D.C. Cir. 1983). Certiorari is required in order to protect the public interest which the ICC has abandoned, and to reinstate the integrity of the administrative process, which the ICC has forsaken.

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[12]This is forcefully demonstrated by the experience with rail rate cases which have been filed since passage of the Staggers Act that have been subjected to the new jurisdictional test. Because of the complexity of the antitrust-type issues and the sheer volume of the evidentiary records which must be compiled to address these issues, the Commission instituted a procedure for bifurcating rate cases filed between October 1, 1980 and March 30, 1981 under Section 229 of the Staggers Act, 94 Stat. 1934, set out in a note following 49 U.S.C. §10701a. Under this procedure, the first inquiry is limited to the market dominance issues and the second deals with the merits of rate reasonableness. Long delays involving market dominance have been the rule. Even of those cases that have been litigated, few have been decided on the merits in an initial decision, and even fewer have been decided on administrative appeal. Yet Congress intended market dominance to be a practical test requiring a determination of jurisdiction within 90 days. 49 U.S.C. §10709(b).

II. THE ICC AND THE COURT OF APPEALS IGNORED THE INTENT OF CONGRESS IN INTERPRETING THE STATUTE

Despite its importance, the court of appeals' *en banc* decision devoted very little attention to the central question: whether the Commission's construction of the 4-R Act definition of market dominance was correct. The court did not conduct an independent review and mistakenly chose to defer to the ICC's noncontemporaneous construction of the 4-R Act. Moreover, the court of appeals' cursory review of the statute and legislative history is fundamentally flawed because it ignores the plain meaning of the statute and misconstrues the intent of Congress. Review by this Court is necessary to rectify these errors.

A. The Statutory Construction Adopted by the ICC and the Court of Appeals Violates the Plain Meaning and Congressional Intent

The ICC's construction of the market dominance statute permits the very result Congress sought to avoid when it enacted the law – turning a threshold jurisdictional determination into an ultimate regulatory standard that can be met only after the conclusion of a long antitrust-type trial. Congress sought to avoid "lengthy antitrust-type litigation" by designing a market dominance standard not as "an ultimate regulatory standard" but rather "as a threshold test to direct the Commission's regulatory activities into areas where the public interest needs protection. . ." S. Rep. No. 94-499, 94th Cong., 2d Sess. 53 (1976).

To accomplish its twin goals of avoiding regulatory delay and preventing the jurisdictional test from becoming an ultimate regulatory standard, Congress eliminated the complexities associated with case-by-case market definition under the antitrust laws by carefully defining and limiting the relevant market for market dominance purposes to the transportation of the same products between the same origin and destination as

that to which the challenged rate applies. The literal meaning of the 4-R Act market dominance definition precludes the ICC from considering product and geographic competition.

Market dominance is defined in Section 10709(a) as "an absence of effective competition for the transportation to which a rate applies" (App. SA-1), or, as originally worded in the 4-R Act Section 202(b), "an absence of effective competition for the traffic or movement to which a rate applies." (App. SA-6).[13] Thus, effective competition is limited to transportation alternatives that can provide competition "for the transportation to which a rate applies." Because commodities move between specified origin and destination points, competition must be in the form of other carriers or modes that can provide the same point-to-point service. *Ex Parte No. 320,* 353 I.C.C. at 904-05 (App. H-10); *WCTL I,* 694 F.2d at 390 (App. C-18). Thus, the plain meaning of the market dominance provision precludes Commission consideration of product and geographic competition.

This plain meaning was considered "explicit" by the ICC in *Ex Parte No. 320,* 353 I.C.C. at 905 (App. H-10),[14] and found to

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[13]No substantive change was intended by the codification of the Interstate Commerce Act in 1978. See note 2, page 3, *supra.*

[14]The ICC commissioners who had helped shepherd the 4-R Act definition of market dominance through Congress had relied on the meaning of the statutory terms in the transportation industry when stating that the statutory language specifically excluded consideration of product and geographic competition:

> When used in this context in the transportation industry, the word "movement" refers to transportation *from a single origin point to a single destination point, while the word "traffic" commonly denotes transportation services from a named set of points to another point or set of points;* from specific areas to rate groups or in blanket areas; or between stated mileage brackets on particular commodities in a given territory. *There is no language in the legislation which would warrant the extension of the*

[footnote continued]

be clear by the dissenting members of the *en banc* court, *WCTL II*, 719 F.2d at 780-782 (App. A-14 to A-16).[15] The failure to consider this plain meaning reflects an improper approach to statutory interpretation by the ICC and the court of appeals. See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Howe v. Smith*, 452 U.S. 473, 483 (1981); *Teamsters v. Daniel*, 439 U.S. 551, 558 (1979).

In addition to carefully defining the term market dominance to exclude product and geographic competition, Congress called upon the ICC to promulgate market dominance rules "designed to provide for practical determination without administrative delay." 4-R Act §202(b) (App. SA-6). As this Court is aware from its analysis of the records in antitrust proceedings, selec-

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[footnote continued]

> *phrase the traffic or movement to which the rate applies, beyond transportation services which are comparable to that described in the issue tariff.*

353 I.C.C. at 904-905 [emphasis added] (App. H-10).

[15]The dissenting judges also relied on section 205 of the Staggers Act (App. SA-10 to SA-12) to support the plain reading of the statute:

> The Staggers Act demonstrates that Congress knew the economic significance of product-geographic competition and referred specifically to those factors when it thought them appropriate. Section 205(a)(1) of the Act requires the Commission to initiate a proceeding to determine whether, and to what extent, "product competition" (defined by the statute to include both what we have called product and geographic competition) should be considered in determining the reasonableness of rates. The instruction is not set forth in the U.S. Code but is contained in the historical note following 49 U.S.C.A. §10701a (West Special Pamphlet 1983). Section 205(a) expressly recites that this directive shall not be construed as altering the meaning, use, or interpretation by the Commission, the courts, or any party of the term "market dominance" . . .

WCTL II, 719 F.2d at 782 [footnote omitted] (App. A-17).

tion of the relevant product and geographic markets in antitrust cases is always a complex and difficult task.[16]

As this Court has noted, a "primary purpose of the 4-R act amendments was to end 'excessive regulatory delay.' "*Southern Ry. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 457 n.10 (1979), *quoting* S. Rep. No. 94-499, *supra*, at 15. The Commission and the court of appeals both ignored this express Congressional intent – as particularly set forth in Section 202(b) of the 4-R Act with respect to market dominance – to define and limit the scope of the Commission's market dominance analysis: to avoid the inevitable delays that would occur if the agency had to consider product and geographic competition in those individual rate cases where a market dominance determinaton is required.

The Commission and the court of appeals also failed to consider the fact that, in the deliberations leading to the enactment of the Staggers Act, Congress expressed the view that the 4-R Act definition of market dominance as adopted in the ICC's 1976 decision in *Ex Parte No. 320* (App. H-9 to H-15), should continue in effect. During its consideration of the Staggers Act, Congress rejected a provision (House Report at 4-5, 55-56) which would have specifically required the ICC to consider product and geographic competition in determining jurisdiction and voted to retain the 4-R Act definition. See, 126 Cong. Rec. 19398-19413 (1980). Had the Commission and the court of appeals properly examined the statutory language and the intent of

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[16]*See, e.g., United States v. Marine Bancorporation*, 418 U.S. 602 (1974); *United States v. Connecticut National Bank*, 418 U.S. 656 (1974); *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973); *FTC v. Proctor & Gamble Co.*, 386 U.S. 568 (1967); *United States v. Grinnell Corp.*, 384 U.S. 563 (1966);*Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).

Congress as revealed by the legislative history, they could not have arrived at their incorrect construction of the statute.[17]

This Court has held that, when Congress re-enacts a statute while indicating its approval of an administrative or other interpretation thereof, Congress is considered to have adopted and ratified that interpretation, and the courts are bound to follow it. *United States v. Sheffield Bd. of Commissioners,* 435 U.S. 110, 134-135 (1978), and cases there cited. The legislative history of the Staggers Act plainly indicates that Congress intended to adopt the "existing law" on market dominance and did not intend "that there be any change in the meaning of the term . . ." Conference Report at 88. Where the Congress has specifically considered and rejected a legislative change to the market dominance definition that would have directed consideration of product and geographic competition, this pointed and focused legislative action is sufficient to invoke this doctrine of re-enactment. *Bob Jones University v. United States,* 103 S. Ct. 2017, 2032-34 (1983), and cases there cited; *Interstate Natural Gas Association v. FERC,* 716 F.2d 1, 10 (D.C. Cir. 1983).[18]

B. The Court of Appeals Abdicated Its Duty to Interpret the Statute.

1. *Role of the Courts in Statutory Construction.*

Under accepted principles of judicial review, this Court has held that the courts are the "final authorities on issues of statutory construction." *Federal Election Commission v. Democratic Senatorial Campaign Committee,* 454 U.S. 27, 32 (1981). As explained by this Court:

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[17]See Generally, Market Dominance in the Staggers Act, 48 I.C.C. Prac. J. 662 (1981).

[18]See also *Association of American Railroads v. ICC,* 564 F.2d 486, 493-94 (1977).

> When the agency's decision is premised on its understanding of a specific Congressional intent, however, it engages in the quintessential judicial function of deciding what a statute means. In that case, the agency's interpretation, particularly to the extent it rests on factual premises within its expertise, may be influential, but it cannot bind a court. *General Electric Co. v. Gilbert, supra, Zuber v. Allen,* 396 U.S. 168, 192-193 (1969); *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944).

Bureau of Alcohol, Tobacco and Firearms v. FLRA, 104 S. Ct. 439, 445 n.8 (1983).

The court of appeals abdicated its role as one of the "final authorities" on statutory construction. Instead of making the independent statutory analysis required by the precedents of this Court, the court of appeals improperly deferred to the ICC's changed, non-contemporaneous interpretation that Congress had rejected. *WCTL II,* 719 F.2d at 777 (App. A-7). As this Court stated in *Zuber v. Allen,* 396 U.S. 168 (1969), the agency's reading of its enabling statute is "only one input in the interpretational equation. . . . The Court may not abdicate . . . ultimate responsibility to construe the language employed by Congress." *Id.* at 192-193.

2. *The ICC's Contemporaneous Construction of the Statute Was Ignored by the Court of Appeals.*

In carrying out the judicial task of interpreting the statutes, the decisions of this Court make clear that a contemporaneous construction of a statute by those agency officials who participated in the legislative deliberations leading to its enactment should be accorded "great weight" by reviewing courts. *Zuber v. Allen,* 396 U.S. 168, 192 (1969). *Accord, Udall v. Tallman,* 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Elec.,* 367 U.S. 396, 408 (1961); *United States v.*

American Trucking Associations, 310 U.S. 534, 549 (1940). Nevertheless, the court of appeals ignored the ICC's contemporaneous construction despite the fact that the ICC officials who drafted that opinion worked side by side with the Congress in drafting the 4-R Act market dominance standard. See *Ex Parte No. 320,* 353 I.C.C. at 940-47 (App. H-16 to H-27). None of the ICC commissioners who decided *Ex Parte No. 320 (Sub-No. 2)* were with the agency in 1976, nor were any involved in the legislative deliberations leading to the enactment of the 4-R Act in 1976. The ICC's contemporaneous construction was upheld by the D.C. Circuit in *ATSF,* and that initial exegesis presents a comprehensive analysis of the text, legislative history and intent underlying the 4-R Act that is deserving of deference. *Chemehuevi Tribe of Indians v. FPC,* 420 U.S. 395, 410-411 (1975). A non-contemporaneous, inconsistent interpretation of statutory language, such as that presented by the ICC in its 1981 decision, is due much less weight. *Local 777, Democratic Union Organizing Committee v. NLRB,* 603 F.2d 862, 869-72, 893-94 (D.C. Cir. 1978).

The court of appeals apparently felt justified in ignoring the ICC's contemporaneous statutory construction, and deferring to the ICC's subsequent re-interpretation of the same provision, because "none can doubt the ICC's authority to change its mind in light of experience." *WCTL II,* 719 F.2d at 778 (App. A-9 to A-10). The ICC asserted that its experience in implementing the 4-R Act demonstrated that undue delay and regulatory complexity would not occur if the agency considered product and geographic competition. *Ex Parte No. 320 (Sub-No. 2),* 363 I.C.C. at 130 (App. D-18). The ICC offered no supporting analysis for this conclusion, for none could have been presented. The administrative impossibility of considering product and geographic competition while making the timely and accurate market dominance determination that is required by the 4-R Act §202(b) (App. SA-6) was initially identified in *Ex Parte No. 320,* and was thereafter confirmed by the agency and

its retained experts on several occasions.[19] No evidence of record supports the ICC's reversal of its 1976 feasibility analysis. The court of appeals erred in deferring to the agency's reasoning.

The court of appeals apparently was unconcerned that the ICC's stated reasons in support of its new statutory constructions flew in the face of all available evidence, as it failed to address this issue, despite the fact that it was a focal point of petitioners' arguments to the court. However, the decisions of this Court require reviewing courts to set aside agency decisions when the agency "offer[s] an explantion for its decision that runs counter to the evidence before the agency. . . ." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856, 2867 (1983). The court of appeals also violated this basic principle of review.

The only other justification offered by the ICC for its new reading of the 4-R Act was the passage of the Staggers Act. Specifically, the Commission stated: "we believe that Congress, in the Staggers Act, intended a much more flexible interpretation." *Id.* at 129 (App. D-16). This contention was so incorrect that it was expressly abandoned by counsel for the ICC in the review proceedings before the court of appeals. *WCTL I*, 694 F.2d at 389 n.52 (App. C-17). Indeed, both the majority and the dissent in the *en banc* decision concluded that the legislative history of the Staggers Act did not change the meaning or intent

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[19] *See, e.g.*, Ex Parte No. 320 (Sub-No. 1), *Rail Market Dominance and Related Considerations*, 45 Fed. Reg. 3353, 3354 (Jan. 17, 1980) ("the Commission and the parties will almost invariably lack the time needed to conduct the analysis needed to define the market involved, much less a detailed market share analysis. . ."); Kearney, Management Consultants, *A Study to Perform an in-Depth Analysis of Market Dominance and Its Relationship to Other Provisions of the 4-R Act* (Interim Report II), at 19 (April 10, 1979) ("Whatever the procedure developed for defining the market, the history of antitrust enforcement provides ample evidence that market definition can become a prolific source of litigation and dispute.")

of the governing 4-R Act standard. *WCTL II*, 719 F.2d at 777, 780 n.1 (App. A-6, A-14).

The abdication by the court of appeals of its role as the final authority on the construction of the market dominance statute has produced results so contrary to the intent of Congress as to require review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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